Recent Decisions

CONSTITUTIONAL LAW—FREEDOM OF PRESS—MOVIE CENSORSHIP

Plaintiffs, two corporations engaged in the motion picture business, brought this suit for judgment declaring the censorship ordinance of Atlanta, Ga., unconstitutional under the due process clause of the Fourteenth Amendment as extended by the United States Supreme Court to include freedom of the press. The defendant admitted that the picture was barred from exhibition in Atlanta, not because it was immoral, but because it would adversely affect the peace of the city. Defendant's motion to dismiss the complaint, on grounds that motion pictures are not entitled to the protection constitutionally accorded the press, was granted. 89 F. Supp. 596 (N.D. Ga. 1950). On appeal, *held,* affirmed. Motion pictures have not emerged from the character of amusement into instruments for the propogation of ideas; therefore, they are not to be considered part of the press. *RD-DR Corp. v. Smith,* 183 F. 2d 562 (5th Cir.) *cert. denied,* 340 U.S. 853 (1950).

By an anomaly of English law rigorous censorship of drama was left unimpaired during the development of the freedom of the press. During the sixteenth and seventeenth centuries the theater enjoyed a status comparable to that of the press. PALMER, THE CENSOR AND THE THEATRE 20-26 (1913). In 1737 Sir Robert Walpole, to quiet the satire of his administration in the theaters of London, persuaded Parliament to pass a bill making mandatory the licensing of all stage plays. 10 GEO. II c. 28 (1737). Had it not been for this statute "the pulpit, press, and play would today be on equal footings." FOWELL AND PALMER, CENSORSHIP IN ENGLAND 78-9 (1913). See Note, 124 A.L.R. 236 (1939). This historical divergency was read into American constitutional law by 1915. *Mutual Film Corp. v. Ohio Indemnity Corp.,* 236 U.S. 230 (1915). Speaking for a unanimous court, Mr. Justice McKenna declared: "It can not be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles not to be regarded as part of the press of the country or as organs of public opinion." The *Mutual Film* doctrine has been universally followed. *Mutual Film v. Hodges,* 236 U.S. 248 (1915); *Nahsen v. Chicago,* 271 Ill. 288, 111 N.E. 119 (1915); *Mehlosu v. Milwaukee,* 56 Wis. 591, 146 N.W. 882 (1915). See Note, 64 A.L.R. 505 (1927).

Judicial assertion that movies are not organs of public opinion, however true in 1915, is rebutted today on every hand. It is common knowledge that censor boards often ban films solely for their idea

content. Kadin, *Administrative Censorships A Study of the Mails, Motion Pictures and Radio Broadcasting,* 19 B. U. L. REV. 533 (1939). Illustrative is a recent Tennessee case which upheld banning a movie because "The South doesn't recognize social equality between the races." *United Artists v. Board of Censors,* 189 Tenn. 397, 225 S.W. 2d 550 (1949), *cert. denied,* 339 U.S. 952 (1950). Of the nine motion picture censorship statutes four exempt current event films, thereby inferring some legislative realization of the changing character of the movie medium. KANSAS LAWS 1925, ch. 196; KAN. GEN. STAT. 1949, §51-103; N.Y. EDUCATIONAL LAW § 1083a; PURDON'S PA. STAT. ANN. 1941, TIT. 4 § 103; VA. CODE ANN. 1949 § 378d. The United States Supreme Court has recognized the expansiveness of the conception of the press by holding that "The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lowell v. City of Griffin,* 303 U.S. 444 (1937), while the Missouri Constitution of 1945 itself recognizes freedom of expression as embracing every means of communication. MO. CONST. ART. 1 § 8. Climaxing this transition in viewpoint is the recent dictum of the Supreme Court, "We have no doubt that motion pictures, like newspapers and radios, are included in the press whose freedom is guaranteed by the First Amendment." *United States v. Paramount Pictures,* 334 U.S. 131 (1948). Nevertheless, the Court has repeatedly refused to reconsider its earlier decision that motion pictures are not within the free press guaranty. *United Artists v. Board of Censors, supra;* Note, 39 COL. L. REV. 1383 (1939). The principal case merely reflects this long standing attitude.

The censorship ordinance in the principal case is analogous to the municipal ordinance invalidated in *Hague v. C.I.O.,* 307 U.S. 496 (1939). That ordinance permitted local officials to refuse permits for public meetings where they would adversely affect the peace of the city. Constitutionality of such an ordinance had been long established. *Davis v. Massachusetts,* 167 U.S. 43 (1897). Determination that these meetings were within the free speech guaranty did not preclude all municipal restriction upon public meetings, but rather circumscribed the area of discretion of the local officials. In reconsidering whether movies are a part of the constitutionally protected press, an affirmative conclusion would not abolish state censorship, but instead would achieve a balance similar to that worked out for public meetings on municipal property. The area of censorship would be limited to consideration of a film's moral aspects, thus protecting expression of ideas from the whim of a censor's discretion, except where extreme circumstances presented a clear and present threat to legitimate governmental objectives.

Donald Tishman

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND RELIGION—SELECTIVE SERVICE ACT

A college dean was convicted in the United States District Court for the Northern District of Ohio of counseling and encouraging a student in his decision to refuse to register as required by the Selective Service Act of 1948. 62 STAT. 604, 50 U.S.C. § 462(a). Defendant argued that he was denied freedom of speech and religion by being deprived of his right to speak freely against acts which were repugnant to his religious beliefs. On appeal, affirmed. *Lary Gara v. United States,* 178 F. 2d 38 (6th Cir. 1949). On certiorari to the United States Supreme Court, *held,* judgment affirmed by an equally divided court without opinion. 340 U.S. 857 (1950).

Our democratic type of government requires for its own survival that persons be allowed to speak freely for or against legislation and urge action upon it. Likewise, advocacy of a doctrine which is abhorrent to most people's ideas of religion or patriotism cannot be made a crime. *Thomas v. Collins,* 323 U.S. 516 (1946); *Williams v. North Carolina,* 317 U.S. 287 (1942); *Stromberg v. California,* 283 U.S. 359 (1931). On the other hand, persons are not protected when they preach for violent overthrow of the government by force. Radical changes can, of course, be advocated, but the rules of the game must be observed. *United States v. Dennis,* 183 F. 2d 201 (2d Cir. 1950), *cert. granted,* 340 U.S. 863 (1950).

In the principal case Judge Allen indicates that the defendant could have spoken against the evils of this law and encouraged its repeal from every platform in America. The action of the defendant, however, was aimed at more than telling the world that he thought the Selective Service Act was bad. He was attempting directly to interfere with its operation. He did not choose to follow the general political procedure for the elimination of bad laws, but rather he chose to attack the law by counseling another in an attempt to secure non-performance of the registration required by the Act. This attack by way of speech, though not conforming to the normal political process, could not be prohibited unless some substantial damage to society were likely to result if such conduct continued unrestricted. Restrictions are justified only when acts do conflict to some considerable extent with the guaranteed rights of others. *Kovacs v. Cooper,* 336 U.S. 77 (1949); *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943); *Martin v. City of Struthers,* 319 U.S. 141 (1943); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Schneider v. State,* 308 U.S. 147 (1939).

The basic problem of the principal case, therefore, is how great a risk or how great an interference with the rights of others must result before the government is justified in prohibiting acts which

are either completed through the medium of speech or bona fide practices of an individual's religion. In *Schenck v. United States,* 240 U.S. 47 (1919), the Court said, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress had a right to prevent." Imminent danger of any substantive evil that Congress may prevent seems to have been the only requirement in order to justify the restriction of speech. Since this "clear and present danger" test was originally unveiled it has undergone considerable modification. It is no longer enough to say that the likelihood that a substantive evil will result will justify restrictions on speech; it is necessary now that the evil itself be "substantial" and "relatively serious." *Whitney v. California,* 274 U.S. 357 (1927) (concurring opinion by Brandeis, J.) or sometimes "extremely serious," *Bridges v. California,* 314 U.S. 252 (1941).

The danger to the defense of our country which would result from a failure to register manpower was considered by Congress to be substantial and serious enough to warrant making counseling against registration a separate and distinct crime. The Court apparently agreed that failure to register manpower in this period in history would be a failure to provide for the common defense. The lack of an embryonic army would constitute a substantial evil, serious enough to allow restriction of speech where that speech creates a clear and present danger that such an evil is likely to result.

Chief Justice Vinson in *American Communications Association v. Douds,* 339 U.S. 382 (1950), said, "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." The real test then of governmental power over First Amendment situations appears to be whether the prescribed acts or conduct are sufficiently injurious to the peace, health, safety, and welfare of society generally so as to counter balance the infringement on personal liberties inherent in every interference by government with free speech. The side toward which the scales will tip will depend upon speculation as to the probable damage which is likely to result to society by the forbidden acts. If the guarantees of the First Amendment were to become absolute, social anarchy would reign; if they could be lightly brushed aside, our civil liberties might well be brushed aside with them. So long as we have this balance concept, we shall have somewhere across the spectrum an area of uncertainty because

reasonable men will differ as to the weight to be accorded to the protection of society. While one's religious beliefs remain inviolate, the practice of those beliefs, consummated through the medium of speech, will continue to be regulated in the interest of society.

Derl D. Oberlin

CONSTITUTIONAL LAW—
STATE LEGISLATION PROHIBITING STRIKES IN PUBLIC UTILITIES

Petitioners, labor unions and their officers, called strikes to enforce union demands against public utility employers after the parties became unable to agree in collective bargaining proceedings. The respondent, Wisconsin Employment Relations Board, charged with enforcement of the Wisconsin Public Utility Anti-Strike Law, WIS. STAT. §111.50 *et seq.* (1947), secured an *ex parte* order from a state court restraining the strikes. The Wisconsin Supreme Court affirmed the action of the lower court and sustained the validity of the statute. *Held,* the statute is invalid because it conflicts with the NLRA, as amended. *Amalgamated Employees of America v. Employment Relations Board and United Workers of America, C.I.O. v. Employment Relations Board,* 71 Sup. Ct. 359 (1951).

The Wisconsin statute prohibits strikes and lockouts where an "impasse" has been reached by the parties in collective bargaining, and provides for compulsory arbitration of the disputes, on the ground that such strikes and lockouts result "in damage and injury to the public . . . and creates an emergency justifying action which adequately protects the general welfare." WIS. STAT. §111.50 (1947).

Legislation prohibiting strikes and lockouts, often providing for compulsory arbitration of disputes, in intrastate public utilities where such strikes might cause injury or inconvenience to the public has been adopted by some eleven states. N. J. STAT. ANN. §34:13B-1 (1947); FLA. STAT. ANN. §453.01 (1947); Bauer, TRANSFORMING PUBLIC UTILITY REGULATION 242 (1950).

Where such legislation has provided for compulsory arbitration, it has been successfully attacked in some states as violative of state constitutions in that the delegation of power to the administrative agencies has not been accompanied by adequate standards. *Transport Workers' Union v. Gadola,* 322 Mich. 332, 34 N.W. 2d 71 (1948); *State v. Traffic Tel. Workers' Federation,* 2 N.J. 335, 66 A. 2d 616 (1949). Compulsory arbitration has also been held violative of the Fourteenth Amendment of the Federal Constitution in that it "deprives the employer of property" and "both the employer and employee of liberty, without due process of law." And a temporary emergency has been held not to justify such a violation. *Dorchy v.*

Kansas, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations,* 262 U.S. 522 (1923).

The principal case held the Wisconsin statute invalid, not for either of the above mentioned reasons, but on the federalistic grounds that by the NLRA, as amended, Congress has regulated labor relations to the full extent of its constitutional power under the commerce clause. By imposing restrictions only upon strikes which might create national emergencies, the Congress has guaranteed the right to strike in all other situations and has thus precluded the states from any activity which might abrogate or restrict this right. Consequently the Wisconsin statute was held to be in conflict with such federal legislation.

Mr. Justice Frankfurter, dissenting, voices the opinion that the federal legislative efforts to prevent national emergencies, without expressly providing for emergencies local in nature, does not preclude state legislation designed to prevent local emergencies, and thus there is no conflict.

The principal case raises the question as to the validity of the Court's indulgence in the negative inference that the Congress meant to preclude state activity by not expressly providing for it. This field being one of concurrent jurisdiction under the "Cooley compromise," the states are given power to regulate until preempted by Congressional intent to "occupy the field." The Court, in interpreting this intent, to determine the degree of occupancy, has recently held that "an intention of Congress to exclude states from exerting their police power must be clearly manifested." *International Union v. Employment Relations Board,* 336 U.S. 245 (1949); *Allen-Bradley Local No. 1111 v. Employment Relations Board,* 315 U.S. 740 (1942). But the Court also, in a similar situation, said, "Exclusion of state action by Federal legislation may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel Co. v. Labor Relations Board,* 330 U.S. 767 (1947). There is no foreseeable limitation on the use of such a "negative inference" in restricting the powers of the states.

The result of the principal case leaves a serious problem of regulation of strikes causing less than national emergencies, the state being impotent to regulate and the federal government failing to provide for such regulation. In the words of Justice Black, dissenting in *H. P. Hood & Sons, Inc., v. DuMond,* 336 U.S. 525 (1949), "The gravity of striking down state regulations is immeasurably increased when it results as here in leaving a no-man's land immune from any effective regulation whatever."

C. William Malone

HABEAS CORPUS—EXHAUSTION OF REMEDIES—PETITION FOR WRIT OF CERTIORARI AS A NECESSARY STEP

Petitioner filed for a writ of habeas corpus in a federal district court, seeking relief from state-imposed imprisonment in violation of his rights under the Federal Constitution. The prisoner based his claim for relief on the fact that he was without the aid of counsel of his own choosing and had not been provided sufficient time to procure witnesses and prepare for his defense. The prisoner had exhausted his state remedies, but he had failed to petition for writ of certiorari to the Supreme Court of the United States. *Held,* Justices Frankfurter, Black, and Jackson dissenting, petition for writ of certiorari is a requisite step in the exhaustion of remedies in the absence of "unusual circumstance." *Darr v. Burford, Warden,* 339 U.S. 200 (1950).

In 1867, Congress gave the federal courts jurisdiction to issue writes of habeas corpus to petitioners held under state proceedings. REV. STAT. §753 (1875). Because of the potential friction that might result between state and federal judicial systems if the imposed jurisdiction were too freely exercised, the Supreme Court of the United States worked out a self-imposed limitation upon the discretionary jurisdiction of the federal judge. This limitation required that a petitioner exhaust all other available remedies before seeking habeas corpus in the federal district court. Though at first the application of the limitation was left to the discretion of the district courts, Ex Parte *Royall,* 117 U.S. 241 (1886); In re *Woods,* 140 U.S. 278 (1891), the Supreme Court soon made "exhaustion of remedies" an absolute condition precedent to issuance of the writ of habeas corpus. Ex Parte *Spencer,* 228 U.S. 652 (1913). A vestige of the original plenary power remained only in the cases involving "unsual circumstances." *Wildenhus's Case,* 120 U.S. 1 (1886); In re *Loney,* 134 U.S. 372 (1890); In re *Neagle,* 135 U.S. 1 (1890).

By Congressional action in 1916, and again in 1925, the right to review by the Supreme Court in state habeas corpus cases was made dependent upon the court's discretion. 39 STAT. §726 (1916), as amended, 43 STAT. §937 (1925); 28 U.S.C. §344 (1946). As a result, in many of the state habeas corpus cases, certiorari would be denied without consideration of the merits of the claim. Speck, *Statistics on Federal Habeas Corpus,* 10 OHIO ST. L. J. 337 (1949). This resulted not only in delay of the final disposition of the claim, but also, in many cases, in a complete denial of relief without any hearing on the merits of the claim by the federal district court. This follows from the fact that the denial of certiorari, unfortunately, is tacitly given weight in the consideration of the petitioner's subsequent petition for the writ of habeas corpus in the federal district court. *Salinger v. Loisel,* 265 U.S. 224 (1924). This

effect of certiorari has not been considered by the Court. Thus in Ex Parte *Hawk*, 321 U.S. 114 (1944), the Court affirmed the strict exhaustion of remedies doctrine, laid down by the pre-certiorari Court. This position was mitigated somewhat by the holding that if the decision of the state court is based upon the conclusion that habeas corpus is not available under the state practice, or if the decision is based upon some adequate non-federal ground, then it is not necessary to seek the writ of certiorari. The Court rationalized this position by pointing out the lack of jurisdiction to review such decisions of the state court. *White v. Ragen*, 324 U.S. 760 (1945).

This tendency to overthrow the traditional rule requiring petition for certiorari to the Supreme Court as a step in the exhaustion of remedies was greatly advanced in *Wade v. Mayo*, 334 U.S. 672 (1948), which the principal case overrules. Justice Murphy concluded, for the majority, that if it appears that the petition for certiorari would be futile, then it is not a requisite step in the exhaustion of remedies. Even if, under the circumstances, certiorari would have been granted, the fact that it was not applied for should only be one consideration before the district court and should not be controlling. In reaching this conclusion Justice Murphy pointed out the frequency of denial of certiorari in state habeas corpus cases without consideration of the merits of the claim and the potential prejudicial effect on subsequent proceedings of the petitioner.

Although the flexible rule of *Wade v. Mayo, supra*, is desirable, as stated in Moore, COMMENTARY ON THE UNITED STATES JUDICIAL CODE, 447-449 (1949), it was abandoned by the Court in the principal case. In this case the majority cited the pre-certiorari cases and read the new provisions of 28 U.S.C. §2254 (1948), in the light of the revisor's note, which declared that the code affirmed the law as laid down in Ex Parte *Hawk, supra*. However, *Wade v. Mayo, supra*, decided June 14, 1948, before the enactment of the new code on June 25, 1948, changed the existing law of Ex Parte *Hawk, supra*. This was not examined by the majority of the Court in the principal case, as they stated that the revisor's note set forth the existing law at the time of passage of the code.

The rocky path toward freedom from state imprisonment by means of federal habeas corpus in the absence of "unusual circumstances" must necessarily include a petition for the writ of certiorari to review the decision of the court of last resort of the state which has refused petitioner's claim for release by habeas corpus. If the petition for certiorari is denied without a hearing on the merits of the claim, the petitioner is subject to the probability that he will be denied all relief without such a hearing. The inroad made upon this doctrine by *White v. Ragen, supra*, still stands as one of the

"unusual circumstances." The flexibility of the remedy as advanced by the *Wade* case, *supra,* is reduced and petitioners, seeking this form of relief, must comply with the traditional pre-certiorari tests of exhaustion of remedies.

Herman J. Weber

INJUNCTIONS—AIDERS AND ABETTORS

The I.C.C. filed a bill to enjoin defendant from inducing and procuring motor carriers to transport goods in interstate commerce for compensation where such carriers have not obtained a certificate of convenience and necessity. *Held,* that the jurisdiction given the district courts by the I.C.A. extends to such an aider and abettor; and, that the carriers are not indispensable parties to the maintenance of such an action. *Interstate Commerce Commission v. Blue Diamond Products Co.,* 93 F. Supp. 688 (S. D. Iowa 1950).

The I.C.A. provides: "If any motor carrier or broker operates in violation of any provision of this chapter . . . the Commission . . . may apply to the district court . . . for the enforcement of such provision . . . and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction. . . ." 49 STAT. 551, 552 (1935), as amended, 49 U.S.C. §§306(a), 309(a) (1950). It has been held that a bill to enjoin persons who are aiding and abetting the commission of unlawful acts is proper, *Securities and Exchange Commission v. Timetrust, Inc.,* 28 F. Supp. 34 (N. D. Cal. 1939), even in situations where such aiding and abetting is not itself a crime in the sense of having a statutory penalty attached to it. *West Virginia v. Adams Express Co.,* 219 Fed. 794 (4th Cir. 1915). These cases appear to afford ample support for holding that the court has jurisdiction over the defendants in this proceeding; however, in the *Timetrust* and *Adams Express* cases, *supra,* the principals were joined as defendants.

All persons having a joint interest are indispensable parties to an action; they must either be joined or the reasons for their nonjoinder pleaded. FED. R. CIV. P. 19(a), 19(c). When these rules have not been complied with the courts will summarily dismiss the action. *Mine Safety Appliances Co. v. Knox,* 326 U.S. 371 (1945). There is, however, no hard and fast rule for determining who are indispensable parties in any given situation. In general they are stated to be those who have such an interest that no final decree can be made without either affecting that interest or leaving the case in such a condition that any final determination thereof would be inconsistent with equity and good conscience. *Metropolis Theatre*

Co. v. Barkhausen, 170 F. 2d 481 (7th Cir. 1948), *cert. denied,* 336 U.S. 945 (1948); *Shuckman v. Rubenstein,* 164 F. 2d 952 (6th Cir. 1947), *cert. denied,* 333 U.S. 875 (1947).

By contrast, in the federal criminal law it is not even required that there be a trial of the principal before an aidor or abettor can be convicted. 18 U.S.C. §2 (1948); *United States v. Gooding,* 12 Wheat. 46 (U.S. 1827).

The principal case presented for the first time the question whether an aider or abettor can be enjoined, without the joining of the principal as a defendant, under the I.C.A. While the *Timetrust* and *Adams Express* cases, *supra,* had indicated that the jurisdiction conferred on the courts by the Act might well embrace one who was inducing others to commit violations thereof, it remained for the principal case to make that proposition into law in a clear and unequivcal fashion. By holding that the carriers are not indispensable parties to such an action the court seems to have acted as the prior civil and criminal cases on the question of parties indicated it should, though the precedents on this point do not seem as strong as those concerning the jurisdictional question.

The court in the present case did not make any great changes in the law. It merely applied the existing law to a novel fact situation. The result seems both logical from a practical standpoint and in keeping with the principles of the precedents and statutes involved. The court obviated the necessity of joining parties who are in no way necessary for the achievement of the purposes of the Act and whose presence could serve no practical purpose.

Charles D. Shook

INSURANCE—REAL PARTY IN INTEREST—LOAN RECEIPTS

Plaintiff sold a defective ladder to a customer who sustained an injury while using it. The customer sued the present plaintiff and recovered a judgment. Plaintiff, upon signing a loan receipt, satisfied the judgment with money received from the insurer. Plaintiff brought this action against the manufacturer of the defective ladder to recover his loss. Defendant contended that the plaintiff was not the real party in interest because he sustained no damage since the judgment was paid with funds of the plaintiff's insurer. *Held,* the payment under the loan receipt constituted a complete payment and discharge of the liability of the insurere to the plaintiff, and therefore the plaintiff is not the real party in interest within the meaning of Section 11241 of the Ohio General Code. *Cleveland Paint and Color Co. v. Bauer Mfg. Co.,* 155 Ohio St. 17, 97 N. E. 2d 545 (1951).

The loan receipt provided, as most loan receipts do, that the amount paid in satisfaction of the insured's liability is a loan and not a discharge of the insurer's liability under the policy. It is repayable to the insurer to the extent of any recovery which is obtained in an action which the insured agrees to bring against the party responsible for the loss. The cost of the suit, which is under the exclusive control and direction of the insurer, is borne by the insurer. If there is no recovery, the insured is under no obligation to repay the loan to the insurer.

If the loan receipt transaction is really a loan, the insured is the real party in interest under Section 11241 which states that, "an action must be prosecuted in the name of the real party in interest. . . ." If the payment under the loan receipt is in full satisfaction of the insured's loss, discharging the insurer's liability under the insurance policy, the insurer is the subrogee of the insured's claim against the tort-feasor and is the real party in interest. Courts of other jurisdictions have divided upon the question. Holding the loan receipt to be a valid loan are *Luchenbach v. McCahan Sugar Co.*, 248 U.S. 139 (1918); *Sosnow, Krance, and Simcoe, Inc., v. Storatti*, 295 N.Y. 675, 65 N.E. 2d 326 (1946); *Phillips v. Clifton Mfg. Co.*, 204 S.C. 496, 30 S.E. 2d 146 (1944). *Contra: American Alliance Ins. Co. v. Capital Nat. Bank*, 75 Cal. App. 2d 787, 171 P. 2d 449 (1946); *Cocoa Trading Corp. v. Bayway Terminal Corp.*, 290 N.Y. 697, 49 N.E. 2d 6*32 (1943). See note, 157 A.L.R. 1255 (1945).

In the *Luchenbach* case, *supra*, a leading case on the question, the policy provided that the insurer would not be liable if the carrier was liable. The insurer paid the loss under a loan receipt agreement. In holding it to be a valid loan, Mr. Justice Brandeis stated that, "it is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

However, cases like the *Luchenbach* case stand on a different footing from the case at bar. In the former the liability of the insurer was contingent in that it was obliged to pay on the policy only if the carrier was not liable. The insured had a real interest in the action because a determination that the carrier was not liable would obligate the insured to return the money to the insurer. There was a stronger justification for considering this a valid loan than in the principal case where the liability of the insurer was not conditional in any way. Here the insurer was bound to discharge its obligation on the policy in any event. The use of the loan receipt device in this situation is a subterfuge to disguise the real plaintiff in the case, and to avoid any prejudices that juries may have against insurance companies. In the principal case the court declared that "it strains our credulity too far to treat that agreement as one

for a loan." The court distinguished the *Luchenbach* case on the difference in the nature of the liability of the insurer.

In *Thompson Heating Corp. v. Hardware Indemnity Inc. Co.*, 72 Ohio App. 55, 50 N.E. 2d 671 (1943), the court of appeals held that the loan receipt agreement was a valid loan. There, however, the liability of the lending insurer was contingent upon the validity of another insurance policy held by the insured with the defendant insurance company. The Supreme Court, in the case at bar, did not specifically refer to the *Thompson* case, but in discussing the cases where the liability of the insurer was contingent, said that they were clearly distinguishable from the principal case where the insurer's liability was absolute.

Where the insurer's liability is absolute the *insurer* is the real party in interest notwithstanding the fact the payment to the insured is clothed in the garb of a loan; but where liability is contingent, there is a basis for a loan in fact, and it is possible the Supreme Court would hold the *insured* to be the real party in interest.

Robert R. Freda

LABOR LAW—ENFORCEABLE UNION SECURITY

During September, 1946 the members of Local 12 passed a motion purporting to increase their regular monthly dues from $1.50 to $2 with the further provision that those members who attended each of the monthly union meetings would be exonerated from the payment of the additional $.50.

Upon failure of employee E to attend the November, 1948, union meeting $.50 of the $1.50 E had authorized to be checked off of his salary each month was applied to the payment of the non-attendance charge. For failure to pay the $.50 now owed on the $1.50 E was suspended from union membership and, upon request of Local 12, was discharged by his employer under a maintenance of membership provision in the collective agreement.

Complaints were filed against the employer and the union for discrimination under Sections 8(a) (3) and 8(b) (2) of the NLRA, as amended. 61 STAT. 136, 29 U.S.C. §141 *et seq.* (1947). *Held,* that E's discharge was a violation of Sections 8(a) (3) and 8(b) (2). The $.50 attendance charge was a fine, not dues. The check-off authorization by E did not give the union discretion to apply the $1.50 for other than dues. Therefore, it was the fine for non-attendance, not regular dues, that was still owed by E; because this fine does not come within the term "periodic dues" used in Sections 8(a) (3) and 8(a) (2) which permit a discharge for non-membership in the union caused by failure to pay the "periodic

dues," these sections have been violated. *Electric Auto-Lite Co.*, 92 N.L.R.B. No. 171 (Dec. 29, 1950).

Section 8(a) (3) provides: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: Provided, That nothing in this act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the *periodic dues and the initiation fees uniformly required* as a condition of acquiring or retaining membership. . . ." Section 8(b) (2) provides: "It shall be an unfair labor practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the *periodic dues and the initiation fees uniformly required* as a condition of acquiring or retaining membership. . . ." One purpose of these sections is to limit enforcement of union security provisions by discharge from employment to the failure to join and/or pay the regular dues and initiation fees. That this was the clear legislative intent is shown by the many statements of senators during debate on these sections. Senator Taft explained: "Under our provision in the committee bill, the closed shop is abolished, and a man can get a job with an employer and can continue in that job if, in effect, he joins the union and pays the union dues." 93 CONG. REC. 4886 (1947); see also 93 CONG. REC. 4284, 4138 (1947). In the principal case the Board explicitly recognized such to be the purpose of these sections: ". . . it is quite evident that such a technique could readily be utilized by unions to circumvent the provisions of Section 8(a) (3) and render meaningless its purpose in limiting enforceable union security to the collection only of 'the periodic dues and initiation fees.'" And it carried out the purpose of these sections by holding that although a union member is entitled, if he wishes, to pay all financial claims against him by his union, whether or not they are enforceable by discharge under Section 8(a) (3), a willingness to pay to the union charges other than the regular monthly dues may not be inferred merely from a blanket check-off authorization or union constitutional provision.

The Board's decision, the first on the problem of using a check-

off device to enforce, by discharge, union obligations other than the payment of periodic dues and initiation fees, does not itself permit such enforcement of other union obligations. However, dictum in the decision suggests permitting this in certain situations. "Therefore, we cannot recognize or give effect to any procedure whereby employee payments to a union intended to be applied to regular monthly dues are diverted to pay other union claims against the employee *unless each specific claim for purposes other than the regular monthly dues is clearly authorized by the employee to be checked-off his earnings. . . .*" Thus it would seem that if E had specifically authorized the union to apply the checked off funds to pay his monthly dues or any other union obligation, the Board would have held that neither the employer nor the union committed an unfair labor practice in the discharge of E. His discharge would be viewed as one for non-union membership which resulted from failure to pay the "periodic dues." It is apparent that such a device would indirectly facilitate the use of a discharge to enforce union obligations other than "periodic dues" and "initiation fees." Use of this device, if not checked, could easily defeat this one purpose of Sections 8(a) (3) and 8(b) (2).

Section 8 does not make a check-off agreement per se an unfair labor practice whether the check-off provision does or does not comply with Section 302(a), (b), and (c) (4), which makes it unlawful for any employer to pay or for any union to receive money of an employee except for "payment of *membership dues.*" *Salant & Salant, Inc.*, 88 N.L.R.B. 816 (1950). In general a check-off "agreement constitutes a violation of the act only in those situations where it is made with an organization that was company-dominated, or which for some other reason did not represent an uncoerced majority of the employees." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533 *affirming* 44 N.L.R.B. 404 (1943); *Salant & Salant, Inc., supra; Bluefield Garment Mfg.*, 75 N.L.R.B. 447 (1947); *Wingert Contracting Co.*, 72 N.L.R.B. 224 (1947). While Section 8 will provide check on the device only where the union is dominated or where the employees are coerced, Section 302(a), (b) and (c) (4) could be a check on the undue expansion of this device. The amount of check would depend upon two factors. First, Section 302 is not self-executing. It will provide check only if the Attorney General actively enforces it. To this date the writer finds no cases of such enforcement. Nor is enforcement likely since neither labor nor management are prone to alienate the other by initiating criminal prosecution. Second, even if the Attorney General enforces this section, it is not clear that there would be much check. The amount of check would depend upon the interpretation of the term "membership dues" used in Section 302(c) (4). If these

words are construed narrowly, *e.g.*, as including only "periodic dues and initiation fees," the device suggested in the dictum of the principal case will amount to nil since it would result in holding that only payment of periodic dues and initiation fees is enforceable by discharge. If, on the other hand, "membership dues" is interpreted more broadly than the wording of Sections 8(a) (3) and 8(b) (2), "periodic dues and initiation fees uniformly required," the suggested device will aid unions by increasing the area of enforceable union security over that permitted under Sections 8(a) (3) and 8(b) (2).

At present whether the interpretations of the terms "periodic dues and initiation fees uniformly required" and "membership dues" will or will not coincide is but a matter of conjecture. The principal case, holding that a fine is not within the term "periodic dues," is the first interpretation by the Board or the courts of the former term; the latter term has been interpreted in an opinion by the Attorney General of the United States as including initiation fees and assessments as well as regular periodic dues. JUSTICE DEPT. OP., 22 L.R.R.M. 46 (1948). Obviously neither term has yet been fully nor conclusively interpreted, but there is a glimmer of a trend to interpret "membership dues" broader than "periodic dues," a result to be expected from the wording of the respective sections of the Act.

To summarize, the Board has indicated receptiveness to the use of the check-off as a means of increasing enforceable union security. The extent to which this doctrine may develop depends in part upon whether the Attorney General enforces Section 302(a), (b) and (c) and, if he does, whether the term "membership dues" is given a broader meaning than the term "periodic dues and initiation fees uniformly required." It is unlikely that the Attorney General will enforce Section 302 and thereby check the suggested device. But notwithstanding the apparent lack of check on the device any prognostication as to whether the device will aid labor organizations or will fade into antiquity unnoticed would be but a futile gesture since the device is but dictum in a case of first impression. To say this does not mean the suggested device is not worthy of careful observation. It may well be the threshold of a large increase in the area of enforceable union security under the NLRA, as amended.

Robert J. Leaver

NEGOTIABLE INSTRUMENTS—DEFENSES—REAL PARTY IN INTEREST—WHEN APPLICABLE

Plaintiff, a bank, holding a note endorsed after maturity, as pledgee reduced same to a cognovit judgment which was vacated pending trial of the issues joined upon petition of defendant endorsers alleging (1) payment, (2) that plaintiff is not the real party in interest, and (3) setting forth an agreement among endorsers as to method of payment. The trial court found that the note had been paid and rendered judgment for the defendants whereupon the plaintiff appealed. *Held,* affirmed, since the plaintiff brought its action as pledgee and also as endorsee after maturity, it is subject to the defense that it is not the real party in interest. *Cleveland Trust Co. v. Beidler,* 58 Ohio L. Abs. 146 (App. 1950).

In Ohio, prior to the adoption of the Uniform Negotiable Instruments Act in 1902, OHIO REV. STAT. Section 3173 provided that an endorsee after maturity was subject to any defense the defendant might have raised against the original payee. Under this statute these defenses were held to include equitable set-off, *Baker v. Kinsey,* 41 Ohio St. 403 (1884); and that the endorsee after maturity was not the real party in interest. *Osburn v. McClelland,* 43 Ohio St. 284, 1 N. E. 644 (1885); *Kernohan v. Durham,* 48 Ohio St. 1, 26 N. E. 982 (1891).

This rule is said to have been changed by the adoption of the Negotiable Instruments Act so that OHIO GENERAL CODE Section 8156 provides that "the holder of a note may bring an action thereon in his own name and is not subject to the defense that he is not the real party in interest." *Wick v. Cleveland Securities Co.,* 71 Ohio App. 393, 50 N. E. 2d 351 (1943).

The term "holder" means the payee or endorsee of a bill or note, who is in possession of it. OHIO GEN. CODE §8295. Such holder is prima facie the owner and, as such, is entitled to bring suit as the real party in interest. *Independent Coal Co. v. Bank,* 6 Ohio C. C. (N. S.) 225, 17 Ohio Cir. 297 (1905); 29 O. JUR. 1235; 10 C. J. S. 1167. The holder of a negotiable instrument transferred as collateral security may sue thereon in his own name. *Flourney v. Sprague,* 214 S. W. 183 (Mo. 1919); BRANNAN, NEGOTIABLE INSTRUMENTS LAW 666 (7th ed. Beutel, 1948); 10 C. J. S. 1177. "An action must be prosecuted in the name of the real party in interest. . . . When a party asks that he may recover by virtue of an assignment, the right of counterclaim, and defense, as allowed by law, shall not be impaired." OHIO GEN. CODE §11241. The test is whether the plaintiff has a real interest in the result. *Thompson Heating Corp. v. Ins. Co.,* 72 Ohio App. 64, 50 N. E. 2d 671 (1943).

The court in the instant case recognizes the rule of the *Wick* case, *supra,* but distinguishes it on the fact that the plaintiff here

was a pledgee who took after maturity. As such it is subject to the same defenses as if the note were non-negotiable; OHIO GEN. CODE §8163; including equitable set-off, *Union Properties, Inc., v. Baldwin Bros. Co.,* 141 Ohio St. 303, 47 N. E. 2d 983 (1943); which approved and followed the rule laid down prior to the Uniform Negotiable Instruments Act in *Baker v. Kinsey, supra.* It should be noted that the Negotiable Instruments Act makes no mention of set-off and, further, that the majority of jurisdictions deny the right of set-off under the Uniform Negotiable Instruments Act. *Lincoln v. Grant,* 47 App. D. C. 475 (1918); *Stegal v. Union Bank & Federal Trust Co.,* 163 Va. 417, 176 S. E. 438 (1934).

The only basis the court gives for its decision is the rule announced in *Osborn v. McClelland, supra,* which was decided prior to the adoption of the Negotiable Instruments Act, and justifies its action in so doing by pointing out the decision of the Ohio Supreme Court in the *Union Properties* case, *supra,* which adhered to the older rule regarding set-off.

It is submitted that from the allowance of a set-off in one case, it does not necessarily follow that a real party in interest defense should be allowed to stand against an endorsee of a note in possession. It would seem more desirable that the courts follow the majority rulings; thus realizing the objective of the Negotiable Instruments Act—uniformity.

Harrison Comstock

NON-PROFIT CORPORATIONS—RIGHT TO INSPECT BOOKS

Plaintiff, a member of defendant non-profit corporation, sought to inspect the books of the defendant. Defendant contended that Section 8623-63 of the Ohio General Code restricts this right to shareholders of corporations for profit. *Held,* that a member of a non-profit corporation has the right to inspect the corporate books. *Bolman v. Automotive Workers Building Corp.,* Court of Common Pleas, Lucas County, Ohio, No. 172025 (unreported, 1949); *affirmed,* Court of Appeals, Lucas County, Ohio, No. 4442 (unreported, 1950); motion to certify denied, June 21, 1950.

This is the first decision of the question under the Ohio General Corporation Act. Although the Supreme Court denied the motion to certify, the opinion of the Common Pleas Court contains a thorough and comprehensive review of the authorities on inspection of corporate books.

At common law the right of a member to inspect the books of a non-profit corporation was well settled, *Matter of Steinway,* 159 N.Y. 250, 53 N.E. 1103 (1899), and this right apparently existed

without regard to whether a shareholder or only a member was concerned. *Venner v. Chicago City Ry.*, 246 Ill. 170, 92 N.E. 643 (1910); 38 C. J. 794. The test is not whether the interest of the party is evidenced by a certificate of stock or of membership, but is whether his interest in the corporation is one which the law will protect. If such an interest appears, the right of inspection is granted to members of non-profit corporations. *State* ex rel *Haeusler v. German Mutual Life Ins. Co.*, 169 Mo. App. 354, 152 S.W. 618 (1912); *McClintock v. Young Republicans of Philadelphia*, 210 Pa. 115, 59 Atl. 691 (1904).

Prior to the principal case there was doubt whether the Ohio General Corporation Act had changed the common law. Section 8623-63 provides, ". . . *every* corporation shall keep . . . the books of account, lists of *shareholders* . . . records of issuance and transfer of *shares* . . . and the minutes of meetings of *every* corporation shall be open to the inspection of *every shareholder* at all reasonable times save and except for unreasonable or improper purposes." (Emphasis supplied) Section 8623-63 does not mention corporations not for profit. It speaks of shares and the rights of shareholders to inspect, but is silent concerning rights of members of non-profit corporations.

There has been one Ohio case on the question. *Ohio Humane Society v. Biles*, 11 Ohio C. C. (N. S.) 384 (1908). This case construed Section 3254 REV. STAT., which provided, "The books and records of such corporations shall at all reasonable times be open to the inspection of every shareholder." The syllabus in the *Biles* case reads, "The provision found in Section 3254 REV. STAT. requiring that the books and records of corporations shall be open to the inspection of stockholders at all reasonable times, has no reference to corporations not for profit." The court held that Section 3254 did not apply to non-profit corporations because such words as *stock* and *stockholder* plainly indicated a legislative intent to confine the application of the section to corporations for profit. Although the same reasoning could be applied to Section 8623-63, the court in the principal case rejected such a narrow construction by interpreting the section in light of the common law. Courts in other jurisdictions have generally reached the same conclusion on the subject. The courts of New York have held that there is an inherent power, apart from the unaffected by particular statutory provisions, to order a disclosure of corporate books and records to a petitioning shareholder. *David v. Sillcox*, 66 N. Y. S. 2d 508 (1946). The court in the principal case made use of the *Sillcox* case because the Ohio Corporation Committee in drafting the Ohio General Corporation Act relating to non-profit corporations gave considerable attention to the membership corporation law of New York, and to similar

statutes in the states of Maryland, Illinois, and Michigan. 1 DAVIES, OHIO CORPORATION LAW 1098 (1942).

The Minnesota Supreme Court has held that a shareholder's right to inspect the corporate books is a right that exists independently of statute. Where the statute is silent as to the right or fails to provide that the statutory rule shall be exclusive, the common law rule remains in effect. *State* ex rel *Gustafson Co. v. Crookston Trust Co.*, 222 Minn. 17, 22 N.W. 2d 911 (1946). Other courts have gone further and held that statutes giving the right of inspection do not restrict the common law right, but enlarge and extend it by removing some of the common law limitations. *Guthrie v. Harkness*, 199 U.S. 148 (1905); *Matter of Steinway, supra.*

The Minnesota court considered the question presented in the principal case when deciding *State* ex rel *Boldt v. St. Cloud Milk Assn.*, 200 Minn. 1, 273 N.W. 603 (1937). The statute involved there provided for the right of inspection with reference to stock corporations only. The court held, however, that the purpose of the statute was not to restrict the common law right, that the policy underlying the rule as to stock corporations applies equally to non-profit corporations, and that, therefore, the right of inspection applies to non-profit corporations.

In all these case, the familiar rule of construction that statutes in derogation of the common law are to be strictly construed was employed to maintain the right of inspection for members of non-profit corporations where the right was not specifically provided for by statute. Thus, it can be seen that the construction placed upon Section 8623-63 by the court in the principal case is in line with case authority in other jurisdictions.

The court in the principal case also held that in view of the fact that the Act refers to *every* corporation, non-profit corporations are subject to its provisions. As a second basis for its decision the court referred to the inherent common law right of members as well as shareholders to inspect the corporate books. In dictum the court stated that this right could not be abridged or supplanted even by statute. This goes further than other courts have yet gone, the common view, as evidenced by the *Gustafson* case, *supra,* being that these statutes merely affirm the common law unless they expressly deny the right or provide that the rights given are exclusive of any other.

Robert R. Freda

PLEADING—STATUTE OF LIMITATIONS—CONTRACT AND BODILY INJURY —APPLICABLE STATUTE DETERMINED BY CHARACTER OF INJURY

Plaintiff brought an action to recover damages for injuries

received while he was a passenger on one of defendant's buses which struck a viaduct pillar. Defendant's demurrers to both the original petition and to an amended petition were sustained upon the ground that plaintiff's action was one for bodily injury and therefore barred by the two year period of limitation of Section 11224-1, Ohio General Code. The court of appeals, in reversing the trial court, took the position that this was an action grounded on an alleged breach of the implied contract of a carrier to transport a passenger safely to his destination and therefore the six year limitation of Section 11222, Ohio General Code, controls. On appeal, *held,* regardless of whether the action sounds in tort or contract, it is nevertheless an action to recover damages for bodily injury and is governed by the two year limitation prescribed by Section 11224-1. *Andrianos v. Community Traction Co.,* 155 Ohio St. 47, 97 N.E. 2d 549 (1951).

It seems well settled that where a common carrier agrees, for consideration, to carry a passenger over its road, and by its negligence an injury results to a passenger, he may at his election sue upon the contract or in tort. *Ann Arbor Rd. Co. v. Amos,* 85 Ohio St. 300, 97 N.E. 978 (1912); *Cincinnati L & A Elec. Rd. v. Lohe,* 68 Ohio St. 101, 67 N.E. 161 (1903); *Pa. Ry. Co. v. Peoples,* 31 Ohio St. 537 (1877); 10 AM. JUR. 346.

While it is true that a choice of remedies lies with the plaintiff enabling him to bring his action either upon the theory of tort or contract, it does not follow that plaintiff's right of election as to the form of his action thereby empowers him to make a particular statute of limitations applicable. A physician who negligently treats a patient is a tort-feasor, but he has also usually committed a breach of a contractual duty to use due care. Nevertheless, an action by the patient for malpractice, even though brought on a contract theory, is subject to the one-year limitation for malpractice imposed by Section 11225, Ohio General Code. *Bowers v. Santee,* 99 Ohio St. 361, 124 N.E. 238 (1919); *Gillette v. Tucker,* 67 Ohio St. 106, 65 N.E. 865 (1902); *Arend v. Mylander,* 39 Ohio App. 277, 177 N.E. 377 (1931). Likewise assault and battery is usually "an injury to the body," but it is nevertheless subject to the one-year limitation for assault and battery imposed by Section 11225, rather than the two year limitation of Section 11224-1. *Sousa v. Schultz,* 8 Ohio L. Abs. 357 (Ct. of App. 1930).

In *Kirchner v. Smith,* 7 O.C.C. (N.S.) 22, 18 O.C.D. 45 (1905), the court held that when property is unlawfully converted the plaintiff can waive the tort, sue in contract and thus come under the longer statute of limitations. The tort statute of limitation, Section 4982, of the Revised Statutes, had no specific provision for conversion, but contained the same provision as subsection 4 of Section 11224, which provides: "4. For an injury to the rights

of the plaintiff not arising on contract nor hereinafter enumerated."

The *Kirchner* case should not be affected by the decision of the principal case. There is no specific statute limiting an action for conversion as in the case of an action for bodily injury. In the absence of an applicable, special statute, "injuries arising on contract" will continue to be subject to the six year limitation of Section 11222. Discussions of the limitation applicable where a benefit has been conferred upon the defendant may be found in Corbin, *Waiver of Tort and Suit in Assumpsit,* 19 YALE L. J. 221 (1910) and the reply by House, *Unjust Enrichments The Applicable Statute of Limitations,* 35 CORNELL L. Q. 797 (1950).

The pertinent statutes considered in the principal case are Section 11222, which provides: "An action upon a contract not in writing, express or implied . . . shall be brought within six years after the cause thereof accrued," and Section 11223-1, which provides: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." It is well established in Ohio that a special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable. *Acme Engineering Co. v. Jones, Admr., BUC,* 150 Ohio St. 423, 83 N.E. 2d 202 (1948); *State,* ex rel. *Elliot Co. v. Connar, Supt. of Public Works,* 123 Ohio St. 310, 175 N.E. 200 (1931); *State,* ex rel. *Steller* et al., *Trustees v. Zangerle, Auditor,* 100 Ohio St. 414, 126 N.E. 413 (1919); 37 O. JUR., 409. In the principal case the court applied this principle to the foregoing statutes and concluded that Section 11224-1 was controlling over Section 11222.

The majority rule is stated in 157 A.L.R. 766 as follows: "The weight of authority is to the general effect that where a statute limits the time within which an action for 'injuries to the person' may be brought, the statute is applicable to all actions the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, in preference to a general statute limiting the time for bringing actions ex contractu." To the same general effect, see: 34 AM. JUR. 84; 53 C.J.S., 1042.

Suporting this view are the following decisions which construe statutes similar in import to Sections 11222 and 11224-1 of the Ohio General Code: *Vandevoir v. Southeastern Greyhound Lines,* 152 F. 2d 150 (7th Cir. 1945), *cert. denied,* 237 U.S. 789 (construing Kentucky statute); *Baltimore & Ohio R. R. Co. v. Reed,* 223 F. 689 (6th Cir. 1915), *cert. denied,* 239 U.S. 640 (construing Indiana statute); *Handtoffski v. Chicago Consol. Traction Co.,* 274 Ill. 282, 113 N.E. 620 (1916); *Coates v. Milner Hotel,* 311 Mich. 233, 18 N.W. 2d 389 (1945); *Loehr v. East Side Omnibus Co.,* 18 N.Y.S. 2d 529

(S. Ct. App. Div., 1st Dept. 1940); *Jones v. Boggs & Buhl, Inc.*, 355 Pa. 242, 49 A. 2d 379 (1946).

It has been suggested that if the unsatisfactory nature of the evidence required to prove the extent of personal injury can be considered the primary factor motivating the shorter limitation, then the form of the remedy chosen should not affect the period of limitation. *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1194 (1950).

The General Assembly made no attempt to classify actions to which Section 11224-1 should apply upon the basis of the remedy chosen. By the explicit terms of the statute it classified them as "actions for bodily injury" which, it seems, should apply to any action the real purpose of which is to recover for personal injury. In the principal case the plaintiff's bodily injuries are the true basis of his actions. Regardless of which remedy he chooses, in order to recover he must prove that the defendant's negligence caused his injuries. The gist of the action is the wrongful injury. Surely the General Assembly would have worded Section 11224-1 differently had it intended that its applicability should depend upon the form of the remedy chosen.

Derl D. Oberlin

TORTS—FEDERAL TORT CLAIMS ACT—ACTIONS UNDER BY SERVICEMEN

During 1949 the federal courts of appeals decided three cases involving tort claims brought by servicemen against the United States.

In the first case, plaintiff's decedent, an army officer on active duty, was killed in the fire of his barracks. Action was brought under the Federal Tort Claims Act, 28 U.S.C. §921 *et seq.* (1946), as amended, 28 U.S.C. §§1346(b), 2671-2680 (Supp. 1950), for alleged negligence in quartering decedent in a barracks made unsafe by a defective heating system. Action dismissed by the district court. On appeal, affirmed. *Feres v. United States*, 177 F. 2d 535 (2d Cir. 1949).

In the second case, plaintiff, a soldier, while on active duty underwent an operation by an army surgeon. Action was brought under the Federal Tort Claims Act for alleged negligence in leaving a towel in plaintiff's stomach. The district court found negligence as a fact but dismissed the action on the ground that the Act does not charge the United States with liability. Affirmed on appeal. *Jefferson v. United States*, 178 F. 2d 518 (4th Cir. 1949).

In the third case, action was brought by the executrix under

the Federal Tort Claims Act for the death of an army officer resulting from alleged negligent medical treatment of army surgeons rendered while decedent was on active duty. The district court dismissed the action. On appeal, reversed. The complaint stated a cause of action under the Act. *Griggs v. United States,* 178 F 2d 1 (10th Cir. 1949).

The Supreme Court in reviewing the three cases in one opinion affirmed the judgments in the *Feres* and *Jefferson* cases and reversed that in the *Griggs* case. *Held,* the United States is not liable under the Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. *Feres v. United States,* 71 Sup. Ct. 153 (1950).

With the passage of the Federal Tort Claims Act Congress waived sovereign immunity for tort claims. The Act provides: ". . . the district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government. . . ." 28 U. S. C. §1346(b) (Supp. 1950). Although the Act as originally proposed contained an express exception as regards claims of servicemen, H. R. REP. No. 181, 79th Cong., 1st Sess. (1945), it was not included among the twelve express exceptions as finally adopted.

In an action by a soldier for injuries received while on active duty but on furlough in a collision with a negligently operated government truck, the court of appeals read into the Act an implied exception of members of the armed forces as a class and denied the claim. *United States v. Brooks,* 169 F. 2d 840 (4th Cir. 1948), Note, 10 OHIO ST. L.J. 106 (1949). Overruled on appeal. The Supreme Court allowed the claim and expressly rejected such an implied exception, " 'Any claim' could not be read to mean 'any claim but that of servicemen.' " *Brooks v. United States,* 337 U.S. 49 (1949), and the Supreme Court further rejected the election of remedy predicate which had been used to deny tort claims of servicemen under the Public Vessels Act, 43 STAT. 1112 (1925), 46 U.S.C. §781 *et seq.* (1946). *Dobson v. United States,* 27 F. 2d 807 (2d Cir. 1928), *cert. denied,* 278 U.S. 653 (1929). *Bradley v. United States,* 151 F. 2d 742 (2d Cir. 1945), *cert. denied,* 326 U.S. 795 (1946). But the Supreme Court in the *Brooks* case, *supra,* carefully limited their holding to claims for injuries not incident to service; "Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it. . . ."

The principal case purports to answer this question, but in the face of the reasoning in the *Brooks* case and the canons of legislative interpretation, the Court is hard pressed to establish its

position. The Court lays the premise that "the primary purpose of the Act was to extend a remedy to those who had been without," because of the bar of sovereign immunity, and "not to visit the Government with novel and unprecedented liabilities." Since the Court can find "no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving," it believes that allowing such claims would create an unprecedented liability and hence is not within the legislative intent. It would seem that the Court is thus applying a basis for denying claims of servicemen which it expressly disclaimed in the *Brooks* case, *i.e.*, exclusion of servicemen as a class.

While few can differ with the ultimate decision denying tort claims for service connected injuries in view of the liberal compensation dispensed to servicemen, it would seem that a better basis for implying the exception could be obtained from an analogy to workmen's compensation laws which provide the sole ground of liability for injuries received in the course of employment but do not preclude tort actions against the employer for injuries received outside of the employment relationship.

Thomas T. Taggart